ABERFOYLE PLANTATIONS LTD. v. KHAW BIAN CHENG

[J. C. (Lord Denning, Lord Jenkins and the Rt. Hon. L. M. D. de Silva) December 1, 1959]

[Privy Council Appeal No. 36 of 1958]

Contract — Conditional Contract — Vendor and Purchaser — Purchase conditional on vendor's obtaining renewal of leases — Time for performance — Deposit money paid — Condition unfulfilled at date fixed for completion of sale — Recovery of deposit money.

By a conditional agreement dated November 8, 1955, the vendor Aberfoyle Plantations Ltd. agreed to sell an estate, consisting of some 1,336 acres of rubber plantations, to the purchaser Khaw Bian Cheng. At the date of the agreement the vendor had a good title to 1,154 acres, but its title to the other 182 acres depended on the success of its negotiations for the renewal of seven previously expired leases. Clause 2 of the agreement provided that the purchaser would pay certain deposits at certain dates and the balance on or before April 30, 1956. Clause 4 provided that "the purchase is conditional on the vendor obtaining . . . . a renewal of the seven leases . . . . . so as to be in a position to transfer the same to the purchaser . . . . and if for any cause whatsoever the vendor is unable to fulfil this condition this agreement shall become null and void and the vendor shall refund to the purchaser the deposit or deposits already made." Clause 9 provided that completion of the purchase was to take place on or before April 30, 1956 and that upon the purchaser paying the balance of the purchase price the vendor should "as soon as possible thereafter" execute a proper transfer of the property to the purchaser. The purchaser duly paid the deposits required under clause 2, but the vendor had not by April 30, 1956, fulfilled the condition stipulated in clause 4 by obtaining a renewal of the leases. The time for obtaining the renewal of the leases was subsequently extended by the purchaser to May 31, 1956. The condition being admittedly still unfulfilled, the purchaser on June 11, 1956 brought this action against the vendor claiming the return of the deposits paid under clause 2.

Held: the purchaser was entitled to the return of his deposits because, on the true construction of the agreement, the condition in clause 4 had to be fulfilled at latest by April 30, 1956 (extended by consent to May 31, 1956), and the contract did not allow the vendor a further reasonable time after that date to perform the condition although some delay in the actual execution of the transfer might be allowable by virtue of the words "as soon as possible thereafter" in clause 9 if the renewal of the leases had been obtained within due time.

The following general principles are warranted by authority and manifestly reasonable:— (i) where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date: (ii) where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time: (iii) where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

Smith v. *Butler* (1) and *In re Sandwell Park Colliery Co.* (2) applied.

Cases referred to:—

(1) *Smith* v. *Butler*, [1900] 1 Q.B. 694.
(2) *In re Sandwell Park Colliery Co.*, [1929] 1 Ch. 277.
(3) *In re Head's Trustees & Macdonald*, 45 Ch. D. 310.
(4) *Bellamy* v. *Debenham*, [1891] 1 Ch. 412.
(5) *Green* v. *Sevin*, 13 Ch. D. 599.
(6) *Stickney* v. *Keeble*, [1915] A.C. 386.
(7) *Smith* v. *Hamilton*, [1951] 1 Ch. 174.

PRIVY COUNCIL, appeal from the Court of Appeal, Federation of Malaya

J. A. Plowman, Q.C. (*J. A. Wolfe* with him) for the appellant.

Geoffrey Cross, Q.C. (*T. A. C. Burgess* with him) for the respondent.

The judgment of their Lords of the Judicial Committee was delivered by:

Lord Jenkins: The question in this case is whether upon the true construction of a conditional agreement dated the 8th November, 1955, and made between the defendant (now appellant) Aberfoyle Plantations Ltd. (hereinafter called "the vendor") of the one part and the plaintiff (now respondent) Khaw Bian Cheng (hereinafter called "the purchaser") of the other part, being an agreement providing, subject to the condition therein mentioned, for the sale by the vendor to the purchaser of a rubber estate in the State of Perak known as the Harewood Estate, and in the events which happened, the purchaser became entitled to the return of deposits amounting to $100,000 paid by him to the vendor thereunder, on the ground that the condition in question had not been performed by the vendor within the time thereby limited for its performance.

The case has given rise to a considerable difference of judicial opinion in the Courts below. The action claiming the return of the deposits was brought by the purchaser in the High Court at Ipoh and heard by Good J., who by an Order dated the 8th November, 1957, dismissed it with costs. On appeal by the purchaser to the Court of Appeal for the Federation of Malaya (Thomson C.J., Sir John Whyatt C.J. (Singapore) and Barakbah J.), that Court by a majority (Sir John Whyatt C.J. dissenting), allowed the appeal, the Order to that effect being dated the 2nd June, 1958. From that Order the vendor now appeals to this Board with the support of two of the four judicial opinions so far delivered.

The Harewood Estate conditionally agreed to be sold under the agreement of the 8th November, 1955, consisted of rubber plantations extending in round figures to a total area of some 1,336 acres.

This area was made up of (a) some 1,154 acres held by the vendor's predecessor in title Harewood Rubber Estates Ltd. as registered proprietor under certificates of title or grants from the Ruler of Perak, as to which no question arises; and (b) some 182 acres comprised in seven leases from the Ruler to Harewood Rubber Estates Ltd. which had in fact expired on the 19th June, 1950.

The vendor had succeeded to Harewood Rubber Estates Ltd.'s interests in 1951, as a result of an amalgamation under which the vendor acquired all the assets of Harewood Rubber Estates Ltd. in exchange for shares.

This meant that the vendor as beneficial owner of the 1,154 odd acres could readily procure the transfer of the legal title to the purchaser; and also that the vendor as between itself and

Harewood Rubber Estates Ltd. would be entitled to the benefit of any renewals of the seven leases comprising the 182 odd acres if and when granted. But unless and until new leases were granted the vendor had no assignable interest in the 182 odd acres. Since the expiration of the leases in June 1950 negotiations for their renewal, pursued over a matter of five years, had by the date of the agreement of the 8th November, 1955, achieved no conclusive result, the delay being largely due to protracted consideration by the State Government of the policy to be pursued with regard to the granting of State leases. In the meantime Harewood Rubber Estates Limited, or the vendor, had remained in permissive occupation of the land comprised in the expired leases: and so the matter stood when the agreement of the 8th November, 1955, was entered into.

The position thus was that at the date of the agreement the vendor had a good title to the 1,154 odd acres, but that its title to the 182 odd acres depended on the success of its negotiations for the grant of new leases; and it was to the latter title that the condition giving rise to the present litigation related.

Their Lordships should next refer to the material provisions of the agreement of the 8th November, 1955.

Clause 1 provides that "subject to the condition contained in Clause 4 the vendor will sell and the purchaser will buy" the property known as the Harewood Estate as described in the Schedule to the agreement, which description includes the land comprised in the seven expired leases.

Clause 2 states the price to be $525,000 apportioned as therein mentioned between land and buildings and movable plant, machinery and utensils, and continues as follows:—

> To account of this sum of $525,000 the Purchaser shall pay to the Vendor the sum of $50,000 on the signing of this agreement, a further sum of $50,000 on or before 1st February, 1956, and to pay the balance on or before 30th April, 1956. The Purchaser shall only be entitled to enter into possession of the Estate after the purchase money of $525,000 has been paid in full, and all profits earned prior to that time shall belong to the Company.

Clause 4, which contains the condition, should be stated in full:—

> The purchase is conditional on the Vendor obtaining at the Vendor's expense a renewal of the seven (7) Leases described in the Schedule hereto so as to be in a position to transfer the same to the Purchaser and if for any cause whatsoever the Vendor is unable to fulfil this condition this agreement shall become null and void and the Vendor shall refund to the Purchaser the deposit or deposits already made under Clause 2 hereof notwithstanding anything contained in Clause 10 hereof.

Clause 7 provides that "the purchaser shall take over purchase and pay for at cost" the various items therein mentioned "as at midnight on the day immediately preceding the date of completion of sale".

By clause 8 "All rubber harvested and on hand as at midnight on the day immediately preceding the date of completion of sale . . . . . shall belong to and remain the property of the vendor . . . ."

Clauses 9 and 10 are of importance. They are in these terms:—

> 9. Completion of the purchase shall take place at the offices of Messrs. Grumitt, Reid & Co. Ltd. on or before the 30th day of April, 1956, and upon the Purchaser paying the balance of the purchase price to the Vendor, the Vendor shall as soon as possible thereafter execute a proper transfer or transfers of the property to the Purchaser or as he shall direct, such transfer or transfers to be prepared and perfected, save as to the execution thereof by the Vendor, by and at the expense of the Purchaser and in the meantime the Vendor agrees to allow the Purchaser to lodge a caveat against all the lands pending the execution of the said transfer or transfers. And the Vendor shall if the Purchaser so requires execute in favour of the Purchaser an irrevocable power of attorney authorising the Purchaser to execute all such transfers and documents as shall be necessary for effectually vesting in the Purchaser the said Mining Leases. (It is agreed that the reference to "the said Mining Leases" at the end of clause 9 is intended as a reference to the seven new leases which the Vendor was required to obtain under clause 4 by way of renewal of the seven expired Leases.)
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> 10. If from any cause (other than the Vendor's default) the purchase shall not be completed on the 30th April, 1956, or the second deposit of $50,000 shall not be made on or before the 1st February, 1956, as herebefore provided then this Agreement shall become null and void and the deposit or deposits already made will be forfeited.

Clause 11 provides that "Upon actual completion of the sale the purchaser shall be entitled to possession of the property hereby agreed to be sold and shall as from that date be liable for all outgoings . . . ." The same clause also provides that "The vendor shall not be liable for any deterioration of the property after the time fixed for completion."

The two deposits of $50,000 payable under clause 2 were duly paid, but the vendor had not by the 30th April, 1956, fulfilled the condition stated in clause 4 by obtaining a renewal of the seven leases. It is true that by letter dated the 25th April. 1956, the Collector of Land Revenue informed the vendor's solicitors that the Ruler in Council had approved the issue of fresh leases and that the vendor's name would be recorded in the Roll of Approved Applications; but it is not suggested that the procuring of such approval and enrolment amounted to compliance with the condition. requiring as it did the obtaining by the vendor of "a renewal of the seven (7) leases . . . so as to be in a position to transfer the same to the purchaser."

In these circumstances the purchaser's solicitors wrote to the vendor's solicitors on the 4th May, 1956, a letter concluding with this paragraph:—

> We refer you to Clause 4 of the Agreement under which our client is entitled to rescind the contract and claim back the deposit. But, before doing so, our client is prepared to give your clients time till the 31st day of May, 1956, by which date they should produce to us the issue documents of title in respect of all the lands contracted to be sold and satisfy us that they are in a position to make a good title and give a registrable transfer. It must be understood that the extension hereby granted is the utmost that our client agrees to and such time must be deemed to be of the essence of

the contract. If a good title to convey all the lands capable of registration is made out by 31st May, 1956, our client will pay over the balance of purchase price and complete the transaction. Otherwise, the contract will stand cancelled and your clients must pay back the deposit with interest together with our client's costs of investigating the title.

The condition being admittedly still unfulfilled, the purchaser by plaint dated the 11th June, 1956, began the action giving rise to the present appeal.

Their Lordships may now return to the question exhaustively debated before them and in the Courts below:— Within what period of time did the agreement (read in conjunction with the purchaser's solicitors' letter of the 4th May, 1956) require the condition contained in clause 4 to be performed? The answer to that question must plainly depend upon the true construction of the agreement, or in other words upon the intention of the parties as expressed in, or to be implied from, the language they have used.

But, subject to this overriding consideration, their Lordships would adopt, as warranted by authority and manifestly reasonable in themselves, the following general principles:—

(i) Where a conditional contract of sale fixes a date for the completion of the sale, then the condition must be fulfilled by that date;

(ii) Where a conditional contract of sale fixes no date for completion of the sale, then the condition must be fulfilled within a reasonable time;

(iii) Where a conditional contract of sale fixes (whether specifically or by reference to the date fixed for completion) the date by which the condition is to be fulfilled, then the date so fixed must be strictly adhered to, and the time allowed is not to be extended by reference to equitable principles.

See *Smith* v. *Butler*,[1] where the purchaser treated a conditional contract as at an end for non-fulfilment of the condition before the date fixed for completion, and it was held that the vendor had until the date fixed for completion to perform the condition; that the contract had therefore gone off through the default of the purchaser; and that he could not recover his deposit. At page 699 of the report Romer L.J. (as he then was) said this:— "To my mind it is reasonably clear that the vendor has until the time fixed for completion, or, if no time is fixed, then a reasonable time, in which to procure the assent of the mortgagee to the acceptance of the purchaser as mortgagor", such acceptance being the condition in question in that case.

In the case of *In re Sandwell Park Colliery Co.*[2] Maugham J. (as he then was) held (following *Smith* v. *Butler, supra*) that where in a debenture holder's action the receiver contracted to sell property included in the debentures subject to the contract being approved and sanctioned by the court, and no date was fixed for obtaining such approval, it had to be obtained before the date fixed for completion of the contract. At page 283 of the report Maugham J., after refering to *Smith* v. *Butler, supra* and quoting the passage from the Judgment of Romer L.J., to which their Lordships have already referred, continued as follows:—

I think, taking the judgments as a whole, it is reasonably apparent that the Court took the view that the date fixed for completion was the time by which the condition had to be performed, and considered that if that time had passed the purchaser might have recovered the deposit. The cases of *In re Head's Trustees and Macdonald*[3] and *Bellamy* v. *Debenham*,[4] though not so closely in point, seem to me to support the view that a condition precedent to the validity of a contract for sale of land must *prima facie*, in the absence of express provision, be fulfilled before the date fixed for completion.

Earlier in the Judgment of Maugham J. (at page 282 of the report) comes this important passage bearing particularly on the third of the propositions above stated:—

Courts of equity, in dealing with actions for specific performance relating to land, have been accustomed to give effect to the real intention rather than to the precise words fixing the date for completion. The effect is that a clause fixing the date for completion is equivalent to a clause stating that completion shall be on that date or within a reasonable time thereafter. But there is no ground for a similar construction in the case of a condition upon which the validity of the contract as one sale '(sic: q. "one of sale")' depends. The distinction is obvious. In the first case both parties are bound, and a moderate delay in completion is thought not to injure either. In the latter, the very existence of the mutual obligations is dependent on the performance of the condition. The purchasers do not know in the first instance if their purchase money will ever be required. In general and in the present case, there is no promise or undertaking by the vendor that the condition will be fulfilled. Equity has, I think, never applied its liberal views as to time to such a condition. If a date is mentioned, the condition must be fulfilled within a reasonable time; there is no difference between the views of law and equity in considering what is a reasonable time, and the uncertain position of the purchasers must be borne in mind.

Before parting with these two authorities their Lordships would observe that the reason for taking the date fixed for completion by a conditional contract of sale as the date by which the condition is to be fulfilled appears to their Lordships to be that until the condition is fulfilled there is no contract of sale to be completed, and accordingly that by fixing a date for completion the parties must by implication be regarded as having agreed that the contract must have become absolute through performance of the condition by that date at latest.

Similar considerations are in their Lordships' judgment applicable where a conditional contract of sale fixes no specific date for completion of the sale by the performance of both sides of the bargain, but does fix a date for the performance on the part of the purchaser of his part of the bargain by payment of the purchase money, even though no definite date is fixed for the performance on the part of the vendor of his part of the bargain by the transfer of the property. In such a case it could hardly have been intended that the purchaser should on the date specified perform his part of the bargain unless by that date a binding contract had been brought into existence by fulfilment of the condition: for unless that had happened by the date specified there would on that date in truth be no contract for the purchaser to perform.

Reverting to the present agreement with these general principles in mind, their Lord-

ships ask themselves whether upon the true construction of this agreement the condition stated in Clause 4 had (as the purchaser contends) to be fulfilled at latest by the 30th April, 1956 (extended to 31st May, 1956, by the purchaser's solicitors' letter of the 4th May) as the date fixed by the parties for the completion of the purchase, or at all events for the performance by the purchaser of his part of the bargain by payment of the balance of the purchase money; or only had to be fulfilled (as the vendor contends) within a reasonable time, on the footing that the agreement did not expressly or by implication fix any particular date by which it was to be fulfilled.

Mr. Plowman's argument for the vendor (as developed before their Lordships) was to this effect:— (i) Having regard to the surrounding circumstances in which the agreement was made it can hardly have been the intention of the parties that the condition (postulating as it did the bringing to a satisfactory conclusion of negotiations which had been dragging on for a matter of six years) must be fulfilled within so short a time as the period of just under six months from the date of the agreement (i.e. 8th November, 1955) to the 30th April, 1956; (ii) Their Lordships should therefore be predisposed in favour of a construction which would give the vendor a reasonable time which to fulfil the condition; (iii) The agreement was well capable of being, and should be, construed as allowing a reasonable time for that purpose; (iv) In view of the absence of any express provision in the contract limiting the time for the fulfilment of the condition, an intention to allow a reasonable time was to be inferred, and the purchaser could only escape this conclusion on the footing that the 30th April, 1956, was the date fixed for completion of the contract, so as to bring the case within the principle of *Smith* v. *Butler* and *In re Sandwell Park Colliery Co., supra;* (v) Clause 9 showed that although the parties themselves described the 30th April, 1956, as the date on which the contract was to be completed, what was to take place on that day did not amount to completion, because on payment of the purchase money the vendor was only made liable under that clause to execute a proper transfer or transfers "as soon as possible thereafter", and this qualification of a vendor's ordinary obligation to convey against payment of the purchase price should be taken to have been advisedly inserted in clause 9, so as to give the vendor a reasonable time to fulfil the condition if it had not already done so, the purchaser's position being protected in the meantime by the caveat and power of attorney therein mentioned.

If he was right so far, Mr. Plowman contended with force that time not being originally of the essence of the contract the purchaser could not make it so by serving the notice of the 4th May, 1956, because it could not then be said that the vendor had been guilty of any delay or default such as had to be shown in order to entitle the purchaser to serve such a notice, and he referred their Lordships to Fry on *Specific Performance 6th Ed. p.* 510 *para.* 1092, *Green* v. *Sevin,*[5] *Stickney* v. *Keeble*[6] and *Smith* v. *Hamilton*[7]. He also contended that, even if a case for the service of such a notice had been made out, the notice (given on the 4th May, 1956, to expire on the 31st May) was in all the circumstances of the case unreasonably short. Given acceptance of the contention that the vendor was entitled to a reasonable time to fulfil the condition, their Lordships would be disposed to agree. But the view they have formed as regards the time for fulfilment of the condition makes it unnecessary to dwell further on this aspect of the case.

The argument presented by Mr. Cross on the purchaser's side, in favour of the view that the agreement demanded fulfilment of the condition at latest by the 30th April, 1956, (extended by the letter of 4th May to 31st May, 1956) appears to their Lordships to be far more convincing. This argument rightly stresses the fact that at the very outset of the agreement the vendor's obligation to sell and the purchaser's obligation to buy were by clause 1 expressed to be subject to the condition contained in clause 4. It was thus made plain beyond argument that the condition was a condition precedent on the fulfilment of which the formation of a binding contract of sale between the parties was made to depend.

Then in clause 4 itself "the purchase" was made "conditional upon" the vendor obtaining a renewal of the leases and in the event of the vendor being "unable to fulfil this condition" the agreement was to "become null and void" and the vendor was to refund the deposit or deposits already made under clause 2, notwithstanding anything contained in clause 10. Reference back to clause 2 shows that the first deposit was to be paid on the signing of the agreement, and the second on the 1st February, 1956, while the balance of the purchase money was to be paid on the 30th April, 1956. But clause 4 in the event of the agreement becoming null and void only required repayment of the deposit or deposits already made under clause 2, without any such requirement as to the balance of the purchase money. This seems to their Lordships to afford some indication that the condition was to be fulfilled (if at all) by the date fixed for the payment of the balance of the purchase money (viz. 30th April, 1956), for the case of avoidance of the Agreement on any later date for non-fulfilment of the condition would demand a provision for repayment of the entire purchase money and not merely the deposit or deposits. It is next to be observed that clauses 9 and 10 contained express provisions as to the completion of the purchase on the 30th April, 1956. Clause 9 provided that the purchase should be completed at the offices of a named company on or before the 30th April, 1956, going on to say:— "and upon the purchaser paying the balance of the purchase price to the vendor the vendor shall as soon as possible thereafter execute a proper transfer or transfers to the purchaser or as he shall direct . . . ." This appears to their Lordships to amount to the fixing of 30th April, 1956,

as the date for completion of the purchase for the purposes of the first of the principles deducible from *Smith* v. *Butler* and *In re Sandwell Park Colliery Co., supra*, and at all events to be well within the extension of that principle above enunciated. On the 30th April, 1956, the purchaser was to pay the balance of the purchase money. That would entitle him to possession of the premises (see clauses 2 and 11) and make the vendor a bare trustee for him. The vendor on his part would become immediately bound to execute the transfers necessary to vest the legal estate in the purchaser, subject to such allowance of time within which to perform that duty as might be indicated by the words "as soon as possible". The provision thus made for the contingency that it might not be possible for the vendor to produce the necessary transfers immediately upon the payment of the balance of the purchase money did not, in their Lordships' opinion, prevent the transaction described as completion of the purchase in clause 9 from amounting for the present purpose to completion of the purchase, which is the description applied to it by the parties themselves. A provision in a sale agreement to the effect that the sale should be completed on such a date and at such a place, when the purchaser should pay the purchase price, and the vendor should thenceforth hold the property in trust for the purchaser, would in their Lordships' view clearly amount to a provision for completion of the sale. At all events the purchaser by paying the balance of the purchase money in accordance with clause 9 would fully discharge his part of the bargain, which must, in their Lordships' view, necessarily presuppose the existence of a binding agreement, of which he would be discharging his part. Clause 10 which requires completion of the purchase (i.e. by payment of the purchase money) on the 30th April, 1956, on pain of forfeiture of the deposits, points in the same direction.

The references in clauses 7 and 8 to "the date of completion of sale" must in their Lordships' view be taken for the present purpose as meaning the 30th April, 1956, as the date agreed by the parties for completion, and so construed appear to their Lordships to support the purchaser's contention.

To take a broader view of the matter, it seems to their Lordships that the vendor's contention as to the construction and effect of the agreement would produce results so unreasonable that the parties should not be taken to have intended them unless the language they have used clearly shows the contrary. The purchaser would have been obliged to perform his part of the bargain on or before 30th April, 1956, by paying the balance of the purchase money before there was any binding contract, and with no assurance that a binding contract would ever emerge. On the other hand the vendor would have been under no effective obligation to procure the fulfilment of the condition within any foreseeable time or at all. Again, from the vendor's point of view, he would have been under an obligation on the 30th April, 1956, to let the purchaser into possession or receipt of the rents and profits against payment of the purchase money, before it was known whether fulfilment of the condition would ever be procured. It is unnecessary to enlarge on the confusion which would thus have resulted in the event of the agreement ultimately being avoided for non-fulfilment of the condition.

On the vendor's side it was argued that the provision in clause 9 to the effect that the vendor should "as soon as possible thereafter execute a proper transfer or transfers of the property to the purchaser" included the doing of what had to be done in order to fulfil the condition stated in clause 4, and thus allowed the vendor a reasonable time after 30th April, 1956, within which to comply with the condition. Their Lordships cannot agree. Under clause 4 what the vendor had to do was to obtain a renewal of the seven leases so as to be in a position to transfer the same to the purchaser. Under clause 9 the vendor was to transfer the property sold (including the leases so renewed) "as soon as possible" after the payment by the purchaser on the 30th April of the balance of the purchase money. But he must by then have obtained the renewal of the leases so as to be in a position to transfer them, even though some delay in the actual execution of the transfer might be allowable by virtue of the words "as soon as possible". The provisions in clause 9 regarding the lodging of a caveat and granting of a power of attorney appear to their Lordships to be (as Mr. Cross submitted) more appropriate to the protection and transfer of existing registered interests than to the procuring of interests yet to be obtained.

Their Lordships can attach no importance to the vendor's argument based on surrounding circumstances. The parties chose to fix 30th April, 1956, by the agreement as the date for what they themselves described as "completion" and must be bound by that choice.

It should also be placed on record that certain evidence as to an alteration made in clause 4 of the draft of the agreement when the matter was in negotiation, which Good J. appears to have admitted, was in their Lordships' view wholly inadmissible for the purpose of construing the agreement itself, and was by common consent excluded from consideration at the hearing before them.

For the reasons above stated, which substantially accord with those expressed by the

majority of the Court of Appeal, and also accord with the principles of *Smith* v. *Butler* and *In re Sandwell Park Colliery Co., supra,* their Lordships are of opinion that the purchaser's appeal to that Court was rightly allowed and that the present appeal by the vendor must fail.

Their Lordships will therefore report to the Head of the Federation of Malaya as their opinion that this appeal ought to be dismissed and that the appellant ought to pay, the costs of this appeal.

Appeal dismissed.

Solicitors: *Shelton, Cobb & Co.; Peacock & Goddard.*

SAJAN SINGH v. SARDARA ALI

[J. C. (Lord Cohen, Lord Denning and Lord Jenkins) December 16, 1959]

[Privy Council Appeal No. 19 of 1957]

Contract — Illegal contract — Property transferred under — Detinue and trespass — Deceit practised on public administration of the country in order to get haulage permit for vehicle — Plaintiff not relying on illegal transaction to establish claim.

The plaintiff Sardara Ali entered into an agreement with the defendant Sajan Singh whereby the defendant was to acquire a lorry (the subject matter of the proceedings) and register it in his own name and obtain a haulage permit for the lorry, but it was intended that the lorry should be purchased by the plaintiff and used by him on his own account. This transaction was in contravention of certain regulations governing the transfer and use of motor vehicles. For some time the plaintiff used the lorry as his own, but operated it in the name of the defendant. Subsequently they fell out and the defendant removed the lorry from the plaintiff's possession without his permission. The plaintiff then brought an action for declaration that he was the owner of the lorry, coupled with a claim in detinue. The learned trial Judge was satisfied as to the truth of the plaintiff's claim but took notice of the illegality and gave judgment for the defendant. He held that as both the plaintiff and defendant had practised deceit on the public administration of the country, it was the duty of the Court to refuse the plaintiff aid. The Court of Appeal reversed this decision and held that the plaintiff could recover damages for trespass as he did not seek to found his claim on the illegal transaction. The defendant appealed.

Held: (1) although the transaction between the plaintiff and the defendant was illegal, nevertheless it was fully executed and carried out, and on that account it was effective to pass the property in the lorry to the plaintiff. Accordingly the plaintiff could succeed in detinue;

(2) the plaintiff also had a clear claim in trespass as on the facts he was entitled to rely on his possession.

Decision of the Court of Appeal reported in [1957] M.L.J. 165 affirmed.

Cases referred to:—

(1) *Scarfe* v. *Morgan* (1838), 4 M. & W. at p. 281.
(2) *Muckleston* v. *Brown* (1801), 6 Ves. Jnr. at p. 69.
(3) *Bowmakers Ltd.* v. *Barnet Instruments Ltd.* [1945] K.B. 65 at p. 70; [1944] 2 All E.R. 579.
(4) *Bishopsgate Motor Finance Corpn. Ltd.* v. *Transport Brakes Ltd.* [1949] 1 K.B. at p. 338.

PRIVY COUNCIL. Appeal from a judgment of the Court of Appeal of the Federation of Malaya (Thomson C.J., Hill and Syed Sheh Barakbah JJ.) reported in [1957] M.L.J. 165, reversing a judgment of the Supreme Court, Federation of Malaya, Settlement of Malacca (Smith J.) September 19, 1956).

R. Milner (*W. R. T. Macaulay*) for the appellant.

Respondent did not appear and was not represented.

Lord Denning: The plaintiff Sardara Ali is a lorry driver living at No. 132 Lorong Panjang, Malacca. The defendant Sajan Singh is a haulier living at Bukit Asahan Estate, Malacca. The two of them entered into an illegal transaction about a lorry. They broke the Regulations which governed the transfer and use of motor vehicles. The question is what are their rights consequent on this illegality.

The Regulations in question were made soon after the war by the Commissioner for Road Transport under the powers conferred on him by the Road Transport Proclamation dated 6th October, 1945: and they were affirmed and continued afterwards by the Road Transport (Amendment) Ordinance, 1949. They fell into two groups.

(i) The Regulations which required vehicles to be *registered* with the Registrar of Motor Vehicles: under these Regulations any person who had a motor vehicle had to register it and give particulars of his title to it. And it was provided that no person should "sell, exchange, part with the possession of, purchase, acquire or take possession of any motor vehicle without a permit in writing from the Registrar." See section 2 of the Registration of Motor Vehicles Regulations dated 10th October, 1945.

(ii) The Regulations which controlled the *use* of vehicles for the carriage of goods. Under these Regulations it was provided that no person should "use a goods vehicle or cause suffer or permit a goods vehicle to be used for the carriage of goods" unless it was an *authorised vehicle,* that is to say, unless there was a haulage permit authorising it to be so used. The Regulations said that a vehicle "shall not be deemed to be an authorised vehicle unless it is used by the holder of a permit in accordance with the conditions of such permit." See section 3 of the Motor Vehicles Commercial Use (Amendment) Regulations 1948.

For some years after the war it was very difficult for a newcomer to get a haulage permit. The policy of the Road Transport Department at that time was to grant haulage permits only to those persons to whom they had been granted before the war.

Their Lordships can now turn to the facts of the case. The plaintiff Sardara Ali is a lorry driver. In 1948 he wanted to acquire a lorry and use it to carry goods on his own account. But he had no chance of getting a haulage permit as he had never had one before the war. The defendant Sajan Singh was a haulier who had apparently had a haulage permit previously and had every chance of getting one. So they came to an arrangement whereby the defendant Sajan Singh was to acquire a second-hand lorry and to register it in his own name and to get a haulage permit for it in his own name, but all the time it was intended that it should belong to the